LE COPY

FILED
JAN 11 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA,

Petitioner,

—against—

RICHARD RUSSELL,

Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, *AMICI CURIAE*

DAVID KAIRYS
Kairys & Rudovsky
1427 Walnut Street
Philadelphia, Pa. 19102

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, N.Y. 10017
Attorneys for National Emergency Civil Liberties Committee

PAUL G. CHEVIGNY
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, N.Y. 10016
Attorneys for American Civil Liberties Union

INDEX

PAGE

Interest of *Amici* 1

Question Presented 2

Statement of the Case 2

Summary of Argument 2

ARGUMENT

I. The history and present status of the entrapment defense supports the decision of the court below 3

A. Historical Background of the Entrapment Defense 3

B. Present Status of the Entrapment Defense 12

II. It is impermissible creative activity for the government to supply the contraband upon which a prosecution is based 21

III. The defense recognized by the court below is essential for the preservation of political liberties 24

CONCLUSION 29

PAGE

Table of Authorities

Cases:

Accardi v. United States, 257 F.2d 168 (5th Cir. 1958) 16, 17

Banks v. United States, 249 F.2d 672 (9th Cir. 1957) 10
Becker v. United States, 62 F.2d 1002 (2nd Cir. 1933) 6
Butts v. United States, 273 F. 35 (8th Cir. 1921) 10

Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968) 14, 15, 16
Casey v. United States, 276 U.S. 413 (1928) 3
Commonwealth v. Harvard, 356 Mass. 452, 253 N.E.2d 346 (1969) 17

Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968) 16

Greene v. United States, 454 F.2d 783 (9th Cir. 1971) 12, 19, 20, 25
Grossman v. State, 456 P.2d 226 (Alaska, 1969) 16

Henderson v. United States, 261 F.2d 909 (5th Cir. 1958) 14

Johnson v. Commonwealth, 180 S.E.2d 661 (Va. 1971) 16
Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960) 18

Kadis v. United States, 373 F.2d 370 (1st Cir. 1967) 11, 17
Klosterman v. United States, 248 F.2d 101 (3rd Cir. 1957) 18

PAGE

Lopez v. United States, 373 U.S. 427 (1963) 10, 11

People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972) 16
People v. Strong, 21 Ill.2d 320, 172 N.E.2d 765 (1961) .. 21

Raley v. Ohio, 360 U.S. 423 (1959) 22
Robison v. United States, 379 F.2d 338 (9th Cir. 1967) .. 16

Sherman v. United States, 356 U.S. 369 (1958) 8, 9, 10, 13, 14, 15, 18, 23
Smith v. United States, 331 F.2d 784 (D.C. Cir. 1964) 11, 16, 19
Sorrells v. U. S., 287 U.S. 435 (1932) 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 15, 17, 21, 23, 27
State v. Boccelli, 105 Ariz. 495, 467 P.2d 740 (1970) 17, 19
State v. Sainz, —— N.M. ——, 11 Cr.L. 2108 (N.M. Ct. of App. 9/29/72) 16

United States v. Anderson, et al. (D.N.J. Cr. No. 602-71) 26, 27
United States v. Bueno, 447 F.2d 902 (5th Cir. 1971) ..19, 21
United States v. Campbell, 235 F. Supp. 190 (E.D.N.Y. 1964) 14
United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970) 10, 11, 16, 19, 21
United States v. Dillet, 265 F. Supp. 980 (S.D.N.Y. 1966) 17, 19
United States v. Freed, 401 U.S. 601 (1971) 24
United States v. Kirschenblatt, 16 F.2d 202 (2nd Cir. 1926) 24

PAGE

United States v. Kros, 296 F. Supp. 972 (E.D. Pa. 1969) 15, 17

United States v. Morrison, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965) 11, 17

Whiting v. United States, 321 F.2d 72 (1st Cir. 1963) 17

Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) 18, 19

Woo Wai v. United States, 223 F. 412 (9th Cir. 1916) 3

United States Constitution:

Fifth Amendment 10

Miscellaneous:

Bramstedt, *Dictatorship and Political Police* (1945), pp. 59-60 25

Chevigny, *Cops and Rebels* (1972), *passim*, esp. 249-276 26

Comment, 1964 U. Ill. L. Forum 821 (1964) 10

Comment, 74 Yale L.J. 942 (1965) 10

Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. of Crim. L., Criminology, and P.S. 447 (1959) 6, 10, 17

Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 Yale L.J. 1091 (1951) 7, 10, 17

Donner, "Agent-Provocateur as Folk-Hero," *Civil Liberties*, September, 1971 25

Donner, "The Confessions of an FBI Informer," *Harper's*, December, 1972, pp. 54, 58 ..... 25, 26

PAGE

Thomas Erskine May, II *Constitutional History of England* (1899 Ed.), p. 276 28

Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245 (1942) 10, 17

Model Penal Code, Tent. Draft No. 9, Sec. 2.10 10

New York Times, December 8, 1970, p. 52 25

Note, 46 Harv. L. Rev. 848 (1933) 17

Note, *Applying Estoppel Principles in Criminal Law*, 78 Yale L.J. 1046 (1969) 23

Rosenbaum, "Run, Tommy, Run," *Esquire*, July, 1971, pp. 51, 58-59 ..... 25, 26

Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871 (1963) 10

Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 Fordham L. Rev. 399 (1959) 17

In the

Supreme Court of the United States

October Term, 1972

No. 71-1585

United States of America,

Petitioner,

—against—

Richard Russell,

Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and the National Emergency Civil Liberties Committee have a long-standing interest in protecting the right of defendants in criminal prosecutions to be free from denial of due process of law and, to be protected against being drawn into criminal activities by government agents bent on securing convictions.

The case at bar draws into question the propriety of the government supplying the contraband upon which a prosecution is based. The question is a complex one, and we believe that our brief will be of substantial assistance to the Court.

Letters consenting to the filing of this brief have been filed with the Clerk.

Question Presented

Is it a defense to a crime of trade in contraband that the government has supplied the contraband or an indispensable element of the contraband?

Statement of the Case

The essential facts of this case are set forth in the majority opinion of the court below. 459 F.2d 671 (9th Cir. 1972).

Summary of the Argument

I. The history of the entrapment defense in this and other courts discloses a *de facto* and in some cases a *de jure* rejection of the "predisposition" standard of the majority in *Sorrells* v. *United States*, 287 U.S. 435 (1932). Regardless of the expressed rationales, the courts have condemned and prohibited prosecutions based on excessive creative activity by government officials even where the defendant's predisposition seems clear. Following this reasoning, some courts, including the court below, have established an entrapment-related defense based on creative government activity under which the government may not supply the contraband upon which a prosecution is based.

II. Courts have found it permissible for an official to offer an opportunity for crime; more creative activity than that is not justified by a legitimate state interest. Supplying an element of the crime implies that that element was available only from the government, and creates a correspondingly great risk of convicting the innocent.

III. The problem of creative activity by officials in complex cases involving political dissenters, makes it essential that the *per se* defense recognized below be adopted by this Court.

ARGUMENT

I.

The history and present status of the entrapment defense supports the decision of the court below.

A. Historical Background of the Entrapment Defense

Entrapment is a judicially created doctrine dating back to 1916.[1] It was first discussed by this Court in *Casey* v. *United States*, 276 U.S. 413 (1928), where Justice Brandeis, dissenting, said the government

> "... may not provoke or create a crime and then punish the criminal, its creature.
>
> • • •
>
> "This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." 276 U.S. at 423-25.

In *Sorrells* v. *United States*, 287 U.S. 435 (1932), a divided Court attempted to define the doctrine, but the

[1] The first decision was *Woo Wai* v. *United States*, 223 F. 412 (9th Cir. 1916).

themes of their division are still with us today. Sorrells was charged with selling one half-gallon of whiskey in violation of the National Prohibition Act. A government agent had visited Sorrells, reminisced about their experiences in the same division during World War I, and, after three requests, was sold a half-gallon of whiskey. Sorrells' request for a jury charge on entrapment was denied by the trial judge.

This Court reversed the conviction and ordered a new trial. In an opinion written by Chief Justice Hughes, the majority framed an entrapment defense prompted by improper governmental conduct but available only to "otherwise innocent persons." The defense was based on an unexpressed intent of Congress to exclude from its criminal statutes the injustice that conviction of entrapped "innocents" would accomplish. Regardless of the nature and extent of the governmental activity, the Court said, there is no entrapment if the defendant has the "predisposition" to commit the crime or if the "criminal design" originates with the defendant.

There are fundamental theoretical and practical problems with this approach. It is contrary to our traditions and beyond our scientific knowledge to attempt to distinguish the criminal from the noncriminal by predispositions or propensities to commit crimes. It is one thing to infer an intent from an act; it is quite another to give crucial significance to a predisposition which is antecedent to and separate from the act itself and the intent to do the act.[1]

---

[1] Nor should we, if we are going to hinge criminality on propensities (even in this limited context), limit ourselves to those who claim entrapment or even to those charged with crime. Assuming an entrapment and therefore the government's responsibility for all but the predisposition, what the *Sorrells* approach does, in a limited context, is to make "predisposition" a crime.

Second, are there really any "innocents" among defendants who have *all* done exactly what Congress has defined as criminal? Those who refuse the government's inducements, provocations or temptations are neither entrapped nor charged with crimes. Clearly, all defendants claiming entrapment who have been induced, provoked or tempted by a government agent, have demonstrated a "predisposition" to commit the crimes they have committed. We know this because they have committed them. They may not have originated the exact plan or the exact details,[1] but they are all "predisposed" in the sense that they all proved to be open to do what they have done, given the inducement, provocation or temptation. Can we say that any of them are *more* predisposed than they *all* are in this sense? Can we say with any real meaning, for instance, that a defendant who has illegally sold liquor ten times after inducement by an agent is more predisposed than one who has done it once after the same inducement? Or that one who must be asked twice is less predisposed than one who completes the sale after the first request? All we really know is that *all* of them are predisposed to sell liquor illegally when induced. And the only appropriate question is whether the governmental conduct is proper; whether, in *Sorrells*, for example, it was proper for the agent to ingratiate himself with the defendant by use of friendship and comradeship and then ask him to commit the crime three times. If entrapment is acknowledged to be illegitimate, it should be because the government has acted improperly, not because the defendant is "innocent."

---

[1] The *precise* criminal act or plan may originate with the government, but the criminal design to do it, no matter how induced, provoked, tempted, or coerced, lies in the mind of the defendant.

Further, this predisposition that purports to distinguish the "innocent" from the "guilty" is impossible of reliable proof. The courts that have followed the *Sorrells* approach do not attempt a dissection of the defendant's mind; they merely rely on the past activities of the defendant, including, in some cases, even suspected and rumored activities for which the government has insufficient evidence to obtain an indictment and conviction.[4] Thus, if one has violated the law in the past, it is assumed that he or she is "predisposed" to do it again. Stated another way, in more practical terms, it means the government is *allowed* to entrap persons with criminal records or bad reputations. The government can selectively prosecute persons it does not like for crimes that it manufactures.

Justices Roberts, Brandeis and Stone, concurring in *Sorrells*, had a different view. They found that the Hughes approach adopts:

> "... a form of words to justify action which ought to be based on the inherent right of the Court not to be made the instrument of wrong.
>
> "• • • •
>
> "Whatever may be the demerits of the defendant or his previous infractions of law, these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors ... [T]o say that such conduct by an official of the government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had

---

[4] See, e.g., *Becker* v. *United States*, 62 F.2d 1002 (2nd Cir. 1933). See generally Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. of Crim. L., Criminology, and P.S. 447 (1959).

previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimates of the good which may come of the conviction of the offender by foul means." 287 U.S. at 456-59.

Thus the lines were early drawn. The Hughes approach, based on a statutory interpretation,[5] recognized the need to stem "shocking" governmental conduct, but only for "innocents" and those not "predisposed" to crime, a task illogical in theory and impossible in practice. The Roberts approach, based on the inherent supervisory power of the Court and public policy, and implemented by the courts, focused on the evil to be remedied—lawless, reprehensible government conduct—and not the individual entrapped.[6]

---

[5] Given the basis for the Hughes ruling, the entrapment defense could, under that view, be abolished by statute. In a similar vein, Justice Roberts asked, concerning the availability of the defense only for "innocents," "Is the statute upon which the indictment is based to be further construed as removing the defense of entrapment from [defendants with bad records or reputations]"? 287 U.S. at 458.

[6] See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091, 1111 (1951):

"Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the criminal classes, justifies the employment of illegal means."

The issues were next confronted in *Sherman* v. *United States*, 356 U.S. 369 (1958). Sherman and an agent met at a doctor's office where they were both being treated for drug addiction. After first refusing, Sherman secured some heroin for the agent and himself. Chief Justice Warren, writing for a majority of five, held there was entrapment as a matter of law, but specifically refused to reconsider *Sorrells* because the issues were not raised below or argued before the Court. The crucial questions—the basis for the doctrine and whether the focus is the government conduct alone or includes an evaluation of the individual defendant—were specifically left open by the majority.

Justice Frankfurter, joined by Justices Harlan, Douglas and Brennan, concurred in an extraordinary opinion that is worth quoting at length:

> "[T]he lower courts have either ignored [*Sorrells*] and continued to rest decisions on the narrow facts of each case, or have failed after penetrating effort to define a satisfactory generalization, see, e.g., United States v. Becker, 62 F.2d 1007 (L. Hand, J.) . . .
>
> "If the defendant is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offenses described. . . . conduct is not less criminal because the result of temptation. . . .
>
> "Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and then to refuse to sustain such methods by effectuating

them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts,' *McNabb* v. *United States*, 318 U.S. 332, 341, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake. . . .

"The crucial question, not easy to answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below the standards, to which common feelings respond, for the proper use of governmental power. . . .

"No matter what the defendant's past record and present inclinations to criminality, or the depth to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. . . .

"Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time and in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities." 356 U.S. at 379-83.

Thus, under the Frankfurter-Roberts approach, entrapment is a self-preservation and self-protection device for

the courts and society, based on the inherent supervisory power of the courts and public policy[7] and implemented by the courts. Its purpose is preservation of the integrity of the courts and society and prohibition of overzealous law enforcement that promotes rather than detects crime. And the very real danger of selective prosecution of persons with bad records or reputations whom the government wishes to punish for political (see Point III, *infra*) or other reasons based on government manufactured crimes —which is embraced under the Hughes approach—is specifically recognized and eliminated under the Frankfurter-Roberts approach. *Id.* at 383.[7a]

The latest discussion of entrapment by this Court came in *Lopez* v. *United States*, 373 U.S. 427 (1963). The majority opinion by Justice Harlan, who joined with Justice Frankfurter in *Sherman*, concludes that the controversy concerning the basis, focus, and implementation of the en-

---

[7] Some courts and scholars also find the doctrine to be compelled by the Fifth Amendment. See, e.g., *Banks* v. *United States*, 249 F.2d 672 (9th Cir. 1957); *Butts* v. *United States*, 273 F. 35 (8th Cir. 1921); *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); *Cowen*, *supra* note 4, at 449; *Donnelly*, *supra* note 6; Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 883-84 (1963); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 263 (1942); Comment, 74 YALE L.J. 942 (1965), Comment, 1964 U. ILL. L. FORUM 821, 826 (1964).

[7a] In 1959, the American Law Institute, in its Model Penal Code, Tent. Draft No. 9 Sec. 2.10, set forth a codification of the Frankfurter-Roberts view, defining entrapment by an objective standard of "substantial risk":

> employing methods of persuasion or inducement which produce a substantial risk that such an offense will be committed by persons other than those disposed to commit it.

trapment defense is unresolved. Since there was no substance to the entrapment claim in *Lopez*, these questions did not have to be resolved, but this Court said of entrapment, without dissent:

> "The defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions. [Citation omitted.] Whether in the absence of a conclusive showing the defense is for the court or the jury, and whether the controlling standard looks only to the conduct of the Government, or also takes into account the predisposition of the defendant, are among the issues that have been mooted. . . .
>
> "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents." *Id.* at 434 (emphasis in original).

As one might expect, *Lopez* has been read by many courts to be an invitation to reassess the entrapment defense and move in the direction of the Frankfurter-Roberts approach. E.g., *Smith* v. *United States*, 331 F.2d 784 (D.C. Cir. 1964) (en banc); *United States* v. *Morrison*, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965); *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967); *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970). That approach, approved during the past forty years by seven Justices of this Court, is still open for approval by a majority.

B. Present Status of the Entrapment Defense

It is our thesis in this section that the Frankfurter-Roberts view—which focuses solely on the government conduct—is not only wiser and more consistent with an ordered, civilized society, but also is now accepted, either *de jure* or *de facto*, by the majority of lower federal courts. The defense recognized by the court below may be viewed as following from the Frankfurter-Roberts approach, or as the court below viewed it, from "*creative* activity" raising "the same underlying objections which render entrapment repugnant to American criminal justice . . ." 459 F.2d at 674, quoting *Greene* v. *United States*, 454 F.2d 783, 787 (9th Cir. 1971) (emphasis added). To establish this thesis we have divided the cases for the purpose of this discussion into five categories: (1) cases still using the language of *Sorrells*: "innocence" and "predisposition"; (2) cases explicitly adopting the Frankfurter-Roberts view; (3) cases adopting both *Sorrells* and the Frankfurter-Roberts view as alternative bases; (4) cases limiting "predisposition" by the concept of abandonment; and (5) cases concerning "creative government activity" not traditionally thought of as entrapment.

1. *Cases Still Using the Language of Sorrells:* "Innocence" and "Predisposition"

Most courts use the language of *Sorrells* concerning "innocence" and "predisposition." A close examination of the facts in these cases, however, reveals that when the government conduct is seriously improper, the courts sustain the entrapment defense, even in the face of clear proof of "predisposition," in effect applying the Frankfurter-

Roberts approach.[8] This point can be demonstrated by an examination of the facts in many cases, commencing with *Sorrells* itself.

In *Sorrells*, although this Court only remanded for a new trial, the majority repeatedly referred to the "innocence" of the petitioner, saying:

> "It is *clear* that the evidence was sufficient to warrant a finding that the act for which the defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, *that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen*, and that the agent lured defendant, *otherwise innocent*, to its commission . . ." 287 U.S. at 441 (emphasis added).

Of course, Sorrells had the "predisposition" in the sense described above, in that we know he was open to sell liquor illegally if a companion from World War I asked him three times. But more importantly, the trial record, as reported in the opinion of the court below, indicated the government had proved that: (1) Sorrells had a reputation in the community as a "rumrunner;" (2) he had subsequently sold liquor illegally to other agents; and (3) his house was subsequently searched and eleven one half-gallons of illicit whiskey—like the one he had sold to the agent—were found. 57 F.2d at 974, 980. This "industrious, law-abiding citizen . . . otherwise innocent," may have been regularly selling whiskey illegally. But the government's role—the induce-

[8] This is both because the "innocence" and "predisposition" concepts are meaningless and open to severe abuse, as is discussed *supra*, and because courts are motivated by the legitimate rationale for the entrapment defense—control of lawless law enforcement and protection of the integrity of the courts and the society.

ment of the defendant by a war companion and the repeated requests—was no better or more properly tolerated because Sorrells was a rumrunner.

Similarly, Sherman had been convicted of two narcotics offenses, five and nine years prior to his arrest, he was addicted to drugs he could only obtain illegally (for which he was undergoing treatment), and he sold narcotics to the government agent. On that record it is hard to explain, or for the lower courts to understand, this Court's finding that, as a matter of law, Sherman was an "innocent" violator. Again, the government conduct, leading the defendant away from treatment and back to his past life with drugs, was the appropriate basis for reversing the conviction.

Since *Sorrells* and *Sherman*, there have been numerous decisions that uphold an entrapment defense based on the language of *Sorrells* but under circumstances where the defendant is factually neither "innocent" nor lacks "predisposition." E.g. *Carbajal-Portillo* v. *United States*, 396 F.2d 944 (9th Cir. 1968) (although defendant was definitely predisposed to sell drugs, court upholds entrapment because defendant was not predisposed to bring them into the United States and sell them here, which he did); *Henderson* v. *United States*, 261 F.2d 909 (5th Cir. 1958) (defendant with prior drug convictions who admitted to prior use found "unwary innocent" even though government agent testified that "we had knowledge that she was in the traffic;" defendant was induced to get drugs from informer's contact for informer and his wife, who were close friends of defendant's and told her they desperately needed the drugs); *United States* v. *Campbell*, 235 F. Supp. 190 (E.D. N.Y. 1964) (agent placed illegal bets with defendant

through a friend of defendant; no repeated requests and evidence that defendant had taken other illegal bets); *United States* v. *Kros*, 296 F. Supp. 972 (E.D. Pa. 1969) (defendant sent obscene material through mail in response to an ad in "Swinger's Life Magazine" placed by the government; court held defendant had predisposition to sell obscene material but no predisposition to do it through the mail, even though defendant responded to the ad from another state and may well have anticipated the use of the mail).

These cases evidence a tortured attempt to find a lack of predisposition when the court believes the government has acted wrongly. Justice Frankfurter recognized this problem with the *Sorrells* approach in *Sherman*:

> "The lower courts have continued gropingly to express the feeling of outrage at conduct of law enforcers that brought recognition of the defense in the first instance, but without the formulated basis in reason that it is the first duty of the courts to construct for justifying and guiding emotion and instinct." 356 U.S. at 378.

There are, however, some threads running through these cases. In each, the government has abused its powers. It has placed an ad in "Swinger's Life Magazine" to entrap lonely readers (*Kros*), encouraged a destitute Mexican citizen to bring narcotics into the United States (*Carbajal*), or interfered with a defendant's attempt to kick drugs (*Sherman*). Very often they involve situations where the government has abused close relationships valued by society, such as friendship or companionship in a war, or interfered with socially useful programs, such as treatment for drug addiction.

2. *Cases Explicitly Adopting the Frankfurter-Roberts View*

A number of courts have explicitly adopted the Frankfurter-Roberts view. *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970) (pre-trial motion to dismiss indictment based on entrapment granted; defendant had the predisposition, but, "Entrapment is indistinguishable from other law enforcement practices which the courts have held to violate due process. . . . Were the courts to sanction the law enforcement activities committed in this case, it would transform the laws designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish, a concept thoroughly repugnant to constitutional principles"); *State* v. *Sains*, —— N.M. ——, 11 Cr.L. 2108 (N.M. Ct. of App. 9/29/72); *People* v. *Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972); *Johnson* v. *Commonwealth*, 180 S.E.2d 661 (Va. 1971) ("The defense of entrapment is, in essence, a rule of fairness that bars the conviction of an accused in the event of improper police conduct"); *Grossman* v. *State*, 456 P.2d 226 (Alaska, 1969). See also *Smith* v. *United States*, 331 F.2d 784, 790, 792 (D.C. Cir. 1964) (en banc); *Dixon* v. *District of Columbia*, 394 F.2d 966, 970 (D.C. Cir. 1968); *Carbajal-Portillo* v. *United States*, 396 F.2d 944, 948 (9th Cir. 1968) (entrapment is a defense "not because inducement negatives criminal intent and thus establishes innocence; but because Government agents should not be permitted to act in such a fashion"); *Accardi* v. *United States*, 257 F.2d 168, 172-73 n. 5 (5th Cir. 1958) (favors but does not adopt Frankfurter-Roberts approach); *Robison* v. *United States*, 379 F.2d 338 (9th Cir. 1967) (same). The Frankfurter-Roberts view is also

clearly favored by most scholars who have written on entrapment.[8]

3. *Cases Adopting Both Sorrells and the Frankfurter-Roberts Approach as Alternative Bases*

A number of courts, faced with the division in this Court and the lower courts, have adopted both approaches as alternative bases. *United States* v. *Morrison*, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965) (applies *Sorrells* standard and, "alternatively, whether, in exposing the defendant's criminality, the government agents have acted in an offensive manner or lived up to reasonably decent civilized standards for the proper use of government power"); *United States* v. *Dillet*, 265 F. Supp. 980 (S.D. N.Y. 1966); *State* v. *Boccelli*, 105 Ariz. 495, 467 P.2d 740 (1970); *Commonwealth* v. *Harvard*, 356 Mass. 452, 253 N.E. 2d 346 (1969). See also *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967); *Whiting* v. *United States*, 321 F.2d 72 (1st Cir. 1963); *Accardi* v. *United States*, 257 F.2d 168 (5th Cir. 1958); *United States* v. *Kros*, 296 F. Supp. 972 (E.D. Pa. 1969) ("the thrust of the doctrine is to enjoin the Government from acting in improper ways").

4. *Cases Limiting "Predisposition" by the Concept of Abandonment*

Where the "predisposition" has been abandoned but then revived as a result of governmental conduct, courts have upheld the entrapment defense, which makes sense under *Sorrells* as well as the Frankfurter-Roberts approach.

---

[8] E.g., Cowen, *supra* note 4; Donnelly, *supra* note 6; Mikell, *supra* note 7; Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959); Note, 46 HARV. L. REV. 848 (1933).

Klosterman v. *United States*, 248 F.2d 101 (3rd Cir. 1957); *Jones* v. *State*, 101 Ga. App. 851, 115 S.E.2d 576 (1960) (bribery charge; the court found that the government sought to trap the defendant and embarrass him in front of the press; "every objection and obstacle which the defendant foresaw was met and solved by the prosecution").

5. *Cases Concerning "Creative Government Activity" Not Traditionally Thought of as Entrapment*

Without specifically adopting or refuting the Frankfurter-Roberts approach, many courts have analyzed entrapment situations in terms of the supervisory power as defined in Justice Frankfurter's concurring opinion in *Sherman*. All of them involve situations where the defendant's predisposition to commit the crime is quite clear (or as clear as that concept can be), but the courts, pursuant to the supervisory power, evaluate only the government conduct.

In *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962) an informer made a contingent fee arrangement with the government; he was to receive a specific amount of money for each specific person he could incriminate. The Court held that such an arrangement must be prohibited pursuant to the supervisory power, that "McNabb and its progeny clearly forbid the Government to make use of the fruits of wrongdoing by its officers or agents." 311 F.2d at 445. Judge Brown, concurring, said:

> "... recognized as is the role of informers in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether

the method used is refined or crude, subtle or spectacular." 311 F.2d at 445.

In *United States* v. *Bueno*, 447 F.2d 902 (5th Cir. 1971) narcotics were purchased in Mexico, brought into the United States by the informer and then sold to a government agent by the defendant. The Court reversed the conviction, pursuant to the supervisory power, saying:

> "... the sales of heroin were made through the creative activity of the government ... The government's case cannot rest on the mere fact that [defendant] entered into the informer's plan willingly." 447 F.2d 906.

The same result was reached on virtually identical facts in *United States* v. *Dillet*, 265 F. Supp. 980 (S.D.N.Y. 1966) and *State* v. *Boccelli*, 105 Ariz. 495, 467 P.2d 740 (1970).

The same principle was applied in *Smith* v. *United States*, 331 F.2d 784 (D.C. Cir. 1964) (en banc) (informer gave defendant heroin in defendant's apartment; defendant's apartment searched and defendant arrested for possession forty-five minutes later); and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970) (undercover agent supplied counterfeit money upon which charge of receiving such counterfeit was based).

In *United States* v. *Greene*, 454 F.2d 783 (9th Cir. 1971) the court noted the sharp division concerning entrapment and created a somewhat different but related defense. Defendants were charged with sale of bootleg liquor, possession of still apparatus, and conspiracy. They had set up a still and were producing bootleg liquor for sale to a man who identified himself as a "syndicate man" but was actually a government agent. The agent assisted de-

fendants over a long period of time and supplied, *inter alia*, parts for the still, containers, and chemicals. The Court found the bootleg liquor "might never have [been] produced" without the assistance and urging of the agent. The Court held:

> "We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators. As pointed out in *Sherman* v. *United States*, *supra*, at 372 a certain amount of stealth and strategy 'are necessary weapons in the arsenal of the police officer.' But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances, the Government's conduct rises to a level of 'creative activity' (*Sherman*, *supra*, at 372), substantially more intense and aggressive than the level of such activity charged against the Government in numerous entrapment cases we have examined." 454 F.2d at 787.

In summary, it is clear that even before the decision of the court below, the courts had set their faces against excessive creative activity in manufacturing crimes, regardless of the rationale adopted in the particular case. The cases in the foregoing sections, even those which appear to go beyond the entrapment defense, may be justified under the Frankfurter-Roberts view, and it is the position of *amici curiae* that that standard should be adopted by this Court.

II.

It is impermissible creative activity for the government to supply the contraband upon which a prosecution is based.

The decision of the majority below in this case, together with the cases relied on there, see Point I (5) *supra; United States* v. *Bueno, supra; United States* v. *Chisum, supra; People* v. *Strong,* 21 Ill.2d 320, 172 N.E.2d 765 (1961), have in effect adopted the position that it is a *per se* defense to a contraband crime if the government has supplied the contraband. *Amici* urge the view that this conclusion is compelled under any theory of the law, although it is almost self-evident under the Frankfurter-Roberts view.

An examination of the policies which lie behind the defense of entrapment, as it has been recognized by this Court, illuminates the policies underlying the decision of the court below. The courts permit agents of the government to offer to a suspected person an opportunity to commit a crime, because otherwise many crimes, especially those involving contraband, could not otherwise be detected. The state has an interest only in apprehending those engaged in criminal activity by the mere offer of a neutral opportunity, see *Sorrells* v. *United States,* 287 U.S. at 441, not in the "manufacturing of crime," *Lopez* v. *United States,* 373 U.S. at 434. There is no state interest in intervening in contraband trade in such a way as to obtain any result other than an arrest based upon an opportunity. If the government supplies the contraband, then it is not acting within the bounds of its legitimate interest.

It will be argued that in a case such as this the government did little different from offering an opportunity; the

defendant was willing to commit the crime and would have done so *if he had been able.* But if that is so, it is impossible to explain why in fact the government did not simply wait until he did commit it *sua sponte,* that is, until he himself obtained the components, manufactured the drug and sold it to the agent. By the act itself of supplying the contraband, or a necessary element of it, the government has told us that merely to supply an opportunity to the defendant was not enough; if it were enough, then that is surely exactly what the government would have done.

This inescapable proposition lies behind all the decisions which condemn any conviction for a contraband crime if the goverment supplies the contraband. The court below suggested as much by its finding that the component, phenyl-2-propanone, could not have been obtained without the intervention of the agent. The dissent disputes that finding, but whether or not it is in fact the case that the component was available from another source is beside the point. If the component really was so easily available, then it was simple for the government merely to wait and buy the finished product from the defendant. The government has implied by its conduct that the crime would not have been committed without its intervention, and cannot now say that it would have been committed in some other way.[10]

The majority below cited this Court's decision in *Raley* v. *Ohio,* 360 U.S. 423 (1959), and the government has branded that reference "inapposite" (Brief for the United States, p. 26 fn. 17). That case is different from this, because there the state had actually advised the defendant

[10] The government apparently concedes, in principle, that the rule advanced here should be the law, although not in this case. Appellants' brief, pp. 11, 27, 32.

that his conduct was permissible. But the estoppel principle which underlies that decision is similar to the one which underlies this: the government, having shown by its conduct that the offer of an opportunity alone was not enough to effect an arrest, cannot now take the position that such an offer was sufficient. See Note, *Applying Estoppel Principles in Criminal Law*, 78 Yale L.J. 1046 (1969).

Other policy considerations support this basic principle. For the government to supply contraband makes it all but impossible to determine whether a given defendant would have sold it without the official source of supply. Under the Frankfurter-Roberts version of the defense of entrapment, it may be said that such supply as a matter of law creates a substantial risk that a person not predisposed will commit the crime—an innocent person will be convicted. Under the *Sorrells* formulation of the defense, it may be said that, when the government supplies the contraband, as a matter of law, the likelihood that the defendant would commit the particular crime cannot be known beyond a reasonable doubt.[11]

In sum, to permit a conviction for the sale of contraband which the government has supplied violates fundamental standards of fairness in two ways. First, there is no interest of the state in prosecuting a manufactured crime; the interest of the state at most supports offering an opportunity to commit a crime which would otherwise be committed. As a matter of logic, supplying the contraband exceeds the bounds of that interest. Second, the interven-

[11] It may be argued that this statement is less true under the special facts of this case, because the defendant showed his propensity by manufacturing the drug. That argument ignores the possibility that the drug might never have been made at all, without the government's intervention.

tion of the government in the supply automatically increases the likelihood that the crime will be committed by someone who would not otherwise have committed it. These two considerations converge to make the conviction in this and similar cases unsupportable either under the Fifth Amendment or under the supervisory powers of this Court.

III.

The defense recognized by the court below is essential for the preservation of political liberties.

This case presents an issue of law of great public importance at this time. The question of the permissible degree of "government intervention" in the commission of crimes has been raised as a public matter repeatedly in recent cases of great notoriety involving prosecutions of political dissidents. As Learned Hand put it,

> "Nor should we forget that what seems fair enough against [liquor law offenders] may take on a very different face if used by a government determined to suppress political opposition . . ." *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2nd Cir. 1926).

Some of the cases involve the actual supplying of contraband, in a manner parallel to this case and its recent forebears. The appendix filed in this Court in the case of *United States* v. *Freed*, which came before this Court on a different point, 401 U.S. 601 (1971), discloses that the unregistered hand grenades which the defendants were indicted for possessing were physically brought to them by an agent of the police.

It is reported that at a trial for conspiracy to cause a riot, in the United States District Court at Tacoma, Washington, an undercover agent testified that he was directed by his government superiors to offer to purchase dynamite and blasting caps, and that he did purchase potassium chlorate, supposedly to make fire bombs. *New York Times*, December 8, 1970, p. 52. It is further reported that one Thomas Tongyai, a government agent operating in Geneva, New York, supplied and taught the use of a rifle and a bomb to college students. Rosenbaum, "Run, Tommy, Run," *Esquire*, July, 1971, pp. 51, 58-59; Donner, "Agent-Provocateur as Folk-Hero," *Civil Liberties*, September, 1971.

Supplying contraband upon which an arrest may be based, either for its possession or some derivative crime, is of course one of the simplest tools of provocation against political dissidents. To cite only one example from a long and dishonorable history, Mussolini's secret police, the OVRA, discredited its enemies and obtained their arrest by planting explosives and weapons. Bramstedt, *Dictatorship and Political Police* (1945), pp. 59-60.

The problem, however, is not limited to the supplying of contraband; there has been a pervasive growth of the "degree of governmental participation" in allegedly criminal enterprises of political dissidents. It is only a step from the supplying of contraband to the provocation of more complex crimes. Cf. *Greene* v. *United States*, *supra*. It has become clear in several recent cases that agents have supplied the driving force for actions resulting in arrests for conspiracy and other criminal charges. See Donner, "The Confessions of an FBI Informer," *Harper's*, December, 1972, pp. 54, 58 (relative to pending prosecution of members of Vietnam Veterans Against the War); Rosen-

baum, *op. cit.*; Donner, *op. cit.*; Chevigny, *Cops and Rebels* (1972) *passim*, esp. 249-276 (collects cases and analyzes one prosecution of Black Panthers). Of these, perhaps the clearest example has occurred in *United States* v. *Anderson, et al.* (D.N.J. Cr. No. 602-71), in which the defendants are charged with conspiracy to destroy and destruction of selective service records. In that case, the government agent, Robert Hardy, stated in an affidavit sworn to February 28, 1972, and filed in the case (affidavit at p. 4):[12]

"It definitely wouldn't have happened without me.

I provided 90% of the tools necessary for the action. They couldn't afford them, so I paid and the FBI reimbursed me. It included hammers, ropes, drills, bits, etc. They couldn't use some of the tools without hurting themselves, so I taught them. My van was used on a daily basis (the FBI paid the gas). I rented trucks for the dry runs and provided about $20 to $40 worth of groceries per week for the people living at Dr. Anderson's. This, and all my expenses, were paid for by the FBI."

Hardy further admitted that he worked with the defendants daily for over two months and provided the strategies and

[12] The *Anderson* case is still pending. The 28 defendants made a pre-trial motion requesting an evidentiary hearing and dismissal of the indictment based on the informer's affidavit, which was denied by the court. In an opinion and order dated August 4, 1972, the court said that although the affidavit raises "serious questions" and its veracity was not repudiated by the government, the issue should be decided at trial. The trial has been scheduled for February 5, 1973.

The *Anderson* case and the other pending cases discussed here, are presented only to show the importance of the instant case to the question of undercover police work with respect to political groups.

necessary tools and equipment (at government expense) for getting into the building and into the file cabinets. He "told the FBI many times that it couldn't have happened if I wasn't there." Here is a signal case of the creative activity of the government which the defense urged here is designed, in part, to curtail. The political provocateur does not necessarily supply the original idea; what he does supply is organization and materials without which the idea would die stillborn. Contraband is usually a part, but only a part of what he brings. The provocateur has, moreover, the courage of a lion and the resourcefulness of Odysseus, because he does not fear detection and arrest as do his putative partners.

In *Anderson* and similar cases, it has been the function of the agent to pull together the "predispositions" of dissidents, often otherwise impractical, into a viable working unit. Adherence to the *Sorrells* approach, with its emphasis on predisposition, would leave the federal courts powerless to limit such political provocations and manufactured crimes. The *per se* defense recognized by the court below thus becomes an essential protection against a growing official abuse.

What a political provocateur does is analytically no different from what government agents have done in this case and other cases concerning impermissible creative activity. These agents make a crime viable by such intervention that it is impossible to determine afterward whether the same crime would have occurred without them (or, in some cases, by such intervention that it is possible to determine that it likely would *not* have happened).

If it is clear that contraband cannot be supplied, then half the tools of the provocateur are gone; moreover, if

the agent cannot supply the raw materials, it will be more difficult for him to supply the binding force of will for a crime. Finally, *amici* have argued above that the state interest in rejecting the defense is very weak. The interest in the healthy development of a political life free from the distortions occasioned by provocation and of individuals in being free from police control is much stronger. In the words of Thomas Erskine May, II *Constitutional History of England* (1899 Ed.) p. 276:

> "Not to profit by timely information were a crime; but to retain in Government pay, and to reward spies and informers, who consort with conspirators as their sworn accomplices, and encourage while they betray them in their crimes, is a practice for which no plea can be offered. No Government, indeed, can be supposed to have expressly instructed its spies to instigate the perpetration of crime; but to be unsuspected, every spy must be zealous in the cause which he pretends to have espoused; and his zeal in a criminal enterprise is a direct encouragement of crime."

If these words are to be fully effective, the defense adopted by the court below must be our law.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

DAVID KAIRYS
Kairys & Rudovsky
1427 Walnut Street
Philadelphia, Pa. 19102

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, N.Y. 10017
Attorneys for National Emergency Civil Liberties Committee

PAUL G. CHEVIGNY
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, N.Y. 10016
Attorneys for American Civil Liberties Union

January 1973